In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 490

SAMUEL H. SHEPPARD,

Petitioner,

vs.

E. L. MAXWELL, Warden,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION, AMICI CURIAE.

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, respectfully move for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari in this case. Counsel for petitioner has consented to this filing; respondent's attorney has denied consent.

For many years, the American Civil Liberties Union and its affiliates have fought to defend and extend the First Amendment guarantees of freedom of speech and press, upon the clear principle that a free society cannot exist unless the persons within its boundaries are permitted—rather, encouraged—to express themselves by word and in print without fear of governmental restraint. And we are aware of the mighty role that a free press plays in helping to establish and preserve that free society. This Court has amply demonstrated its own dedication to these principles.[1]

[1] See *Bridges v. California*, 314 U. S. 252 (1941); *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Wood v. Georgia*, 370 U. S. 375 (1962).

But it is equally clear that freedom without justice is an empty virtue. "The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear." [2] It has been observed that "not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community." [3]

The point at which free press and fair trial intersect in the administration of criminal justice—the notorious criminal trial amidst inflammatory publicity in an aroused community—presents serious and complex problems to those who would defend both the principles of freedom and justice. As the quantum and the techniques of the communications media continue to expand, as the public thirst for the contemporaneous details of notorious criminal trials continues unslaked, the quality of criminal justice in the courts of our land will be subjected to ever-increasing stresses unless this Court provides detailed working principles to guide the trial courts of the states (as well as the federal courts which it directly supervises) in the administration of this most difficult task.

In recent years, this question has been thrust forcibly and dramatically before the attention of the American public.[4]

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[2] *Pennekamp v. Florida*, 328 U. S. 331, 357 (1946) (concurring opinion).

[3] *Irvin v. Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

[4] *Report of The President's Commission on the Assassination of President John F. Kennedy* (1964), pp. 231-242. "The experience in Dallas * * * is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." P. 242.

This Court, on a case by case basis, has already begun the task of weighing the delicate due process considerations involved when a notorious criminal trial takes place in a community inflamed by massive prejudicial publicity.[5]

The case at bar provides the Court with yet a further opportunity to analyze and refine working constitutional principles to guide the trial courts through this most sensitive area of criminal due process. For, through the auspices of the Great Writ,[6] a number of varieties of prejudicial trial and pretrial publicity have been preserved for review by this Court.

In the firm belief that this case presents a clear opportunity for this Court to further delineate the federal constitutional standards of criminal due process as they relate to inflammatory publicity surrounding notorious trials, and in the hope that in some measure they may be of assistance to the Court in performing its delicate task of assuring that "the conclusions to be rendered in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print" [7] while "refusing to sacrifice freedom of press to the whims of judges," [8] this application is filed.

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[5] *Marshall v. United States*, 360 U. S. 310 (1959); *Janko v. United States*, 366 U. S. 716 (1961); *Irvin v. Dowd*, 366 U. S. 717 (1961); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Estes v. Texas*, 381 U. S. 532 (1965). Cf. *Shepherd v. Florida*, 341 U. S. 50 (1951) (concurring opinion); *Stroble v. California*, 343 U. S. 181 (1952).

[6] *Fay v. Noia*, 372 U. S. 391 (1963); *Townsend v. Sain*, 372 U. S. 293 (1963). "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. * * * Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay v. Noia*, 372 U. S. 391 (1963).

[7] *Patterson v. Colorado*, 205 U. S. 454, 462 (1907).

[8] Douglas, J., *The Public Trial and the Free Press*, 33 Rocky Mt. L. Rev. 1 (1960).

Because we consider it to be highly important to the advancement of these objectives that this Court consider this case on its merits, movants seek to participate at this preliminary stage of these proceedings by filing the attached brief *amicus* in support of the petition for certiorari.

Respectfully submitted,

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BRIEF OF AMICI CURIAE.

STATEMENT OF THE CASE.

On December 21, 1954, petitioner, Samuel H. Sheppard, was convicted of murder in the second degree for the slaying of his wife after a sensational jury trial which captivated the attention of the nation.

Marilyn Sheppard, petitioner's pregnant young wife, had been bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Petitioner told police and testified in court that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white form standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. Petitioner has consistently denied guilt from the date of the murder until and including the present time. He at first denied, but later

admitted having had sexual relations with a former employee of the hospital upon whose staff petitioner served as a doctor of osteopathic surgery. The prosecution contended that this affair was the motive for premeditated murder, although the jury verdict did not support a finding of premeditation.

Petitioner was arrested for murder on July 30, 1954; he was admitted to bail and indicted a few days later, on August 17, 1954. He remained in custody thereafter until his trial. The nine-week trial began on October 18, 1954; the jury began its deliberations on December 17, 1954 and five days later a verdict of guilty of murder in the second degree was returned. Petitioner was thereafter sentenced to life imprisonment in the Ohio Penitentiary.

The news coverage of the murder, the pretrial investigation and the subsequent trial was massive, detailed, pervasive, inflammatory, colorful and "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media." [9] The trial and pretrial publicity which permeated the atmosphere in which petitioner stood trial for murder was succinctly described by the Ohio Supreme Court in reviewing his conviction:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the

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[9] S. 23, majority opinion, Sixth Circuit Court of Appeals. The prefix "S" refers throughout to the page of the appendix attached to the petition for certiorari.

courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St. 293, 294, 135 N. E. 2d 340, 342 (1956).

An adequate summary of the barrage of publicity which inundated the community before and during petitioner's murder trial is beyond the scope of this statement of facts.[10] For purposes of this Court's review of the petition for certiorari, however, the damaging trial and pretrial publicity may be categorized as follows:

1. Publicity relating to the strength of the state's case or the guilt of the accused, procured or cooperated in by state law enforcement authorities.[11]
2. Publicity relating to testimony of witnesses not offered at trial by the prosecution.[12]
3. Publicity relating to evidence which would have been inadmissible if offered at trial.[13]
4. Publicity which made celebrities of the trial jurors.[14]
5. Publicity charging guilt or attacking the character of the accused.[15]

Because of the inflammatory atmosphere generated by the adverse publicity, defense counsel moved for a continuance,

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[10] Examples of some of the newspaper clippings, photographs and editorials which appeared in Cleveland journals are appended to the petition for certiorari. All of these materials which appeared in Cleveland newspapers between the dates of the murder and petitioner's conviction are collected in bulk in five green scrapbooks certified to this Court by the Court of Appeals. Additional examples are discussed in the argument, *infra*.

[11] E.g., S. 110, S. 125, S. 126, S. 127.

[12] E.g., S. 109, S. 110, S. 126, S. 127.

[13] E.g., S. 119, S. 120.

[14] E.g., S. 103, S. 105, S. 106, S. 107, S. 108, S. 128.

[15] E.g., S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 122, S. 123, S. 124, S. 125, S. 126, S. 129.

change of venue and mistrial both before and repeatedly during the trial. All such motions were denied by the trial court.

During the course of the jury empanelling, 13 of the 64 prospective jurors examined were dismissed for cause because they had prejudged the guilt or innocence of the accused.

While the jurors who were ultimately empanelled were sworn to impartiality, eleven of the twelve who returned the verdict admitted exposure to the pretrial publicity, one had paid particular attention to each detail of the case offered by the news media, the better to discharge his duties as a juror, and the twelfth juror, although asserting that, during the period of more than three months between the murder and the commencement of the trial, she had heard nothing about the case, admitted receiving the Cleveland Press daily at her home.

The trial court did not sequester the jury; consequently, all of the jurors were permitted to return to their homes when court was not in session during the nine-week trial.

Since his conviction and the denial of his motion for new trial, petitioner's attempt to obtain a new trial has been the subject of sustained litigation for the past eleven years. Both his conviction and the denial of his motion for new trial were affirmed by the Court of Appeals for Cuyahoga County, Ohio.[16] The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial,[17] and affirmed the conviction,[18] two judges dissenting.

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[16] *State v. Sheppard*, 100 Ohio App. 345, 128 N. E. 2d 471 (1955); *State v. Sheppard*, 100 Ohio App. 399, 128 N. E. 2d 504 (1955).

[17] *State v. Sheppard*, 164 Ohio St. 428, 131 N. E. 2d 837 (1956).

[18] *State v. Sheppard*, 165 Ohio St. 293, 135 N. E. 2d 340 (1956).

Application for certiorari was denied by this Court[19] and his application for rehearing was also denied.[20] Petitioner's subsequent petition for a writ of habeas corpus to the Ohio Supreme Court was denied.[21]

On April 11, 1963, petitioner filed an application for a writ of habeas corpus in the United States District Court of the Southern District of Ohio, charging that his conviction was constitutionally defective in a number of respects, including a denial of due process of law resulting from the adverse newspaper publicity before and during his trial. On July 15, 1964, the District judge concluded, upon examining the trial and pretrial publicity and other matters, that petitioner did not have a fair trial and that his conviction was, therefore, inconsistent with the United States Constitution, ordered his release on bail from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954, and granted the State of Ohio sixty days within which to take further action against petitioner.[22]

Respondent appealed the order of the United States District Court which voided the state court conviction. On May 5, 1965, the Sixth Circuit Court of Appeals (two

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[19] *Sheppard v. Ohio,* 352 U. S. 910 (1956). Justice Frankfurter's memorandum opinion concurring in the denial of certiorari, however, was careful to point out that "[s]uch denial of his petition *in no wise implies that this Court approves the decision of the Supreme Court of Ohio* [denying petitioner's claim that the publicity surrounding his trial deprived him of due process of law]. It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision." (Emphasis and bracketed material supplied.) 352 U. S. 910, 911 (1956).

[20] *Sheppard v. Ohio,* 352 U. S. 955 (1956).

[21] *State ex rel. Sheppard v. Alvis,* 170 Ohio St. 551, 167 N. E. 2d 94 (1960).

[22] *Sheppard v. Maxwell,* 231 F. Supp. 37 (S. D. Ohio 1964).

judges for the majority and one dissenting) reversed the judgment of the District Court and remanded petitioner to the custody of respondent.[23] Thereafter, a petition for rehearing was denied and on July 26, 1965, the Court of Appeals stayed the mandate pending application for certiorari to this Court. The petitioner remains at large on bail.

QUESTIONS PRESENTED.

I.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory publicity asserting the strength of the state's case and the guilt of the defendant, where much of this information was transmitted to the public before and during the trial by the news media with the cooperation of, or by the procurement of state law enforcement authorities, and where defense motions for change of venue, continuance and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

II.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory publicity asserting the strength of the state's case and guilt of the defendant, where a part of such publicity related to the damaging testimony of prosecution witnesses

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[23] The opinion of the Court of Appeals is reported at 33 U. S. L. Week 2588 (May 5, 1965) and is reproduced in the appendix to the petition for certiorari at 3. 1.

transmitted to the public by the news media before and during the trial, although the prosecution never produced such witnesses at the trial, and where defense motions for change of venue, continuance and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

III.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory publicity asserting the strength of the state's case and the guilt of the defendant, when a part of such publicity relating to damaging evidence which, if offered at the trial, would have been inadmissible in evidence, was transmitted to the public by the news media before and during the trial, and where defense motions for change of venue, continuance and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

IV.

In a notorious capital prosecution in a state court, where the identities, addresses, families and personalities of the trial jurors were transmitted to the public by the news media during the trial in such a manner as to make celebrities of such trial jurors in the aroused community in which the trial was held, is a conviction thereby obtained a denial of due process of law within the meaning of the

Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

V.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory and accusatory publicity asserting the guilt of the defendant, where damaging episodes attacking the defendant's character were transmitted to the public by the news media before and during his trial, and where defense motions for continuance, change of venue and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

REASONS FOR GRANTING THE WRIT.

Although this Court has scrupulously guarded the right of the independent press to publish out-of-court news and editorial comment about pending judicial proceedings virtually without governmental restraint[24] within the past half-dozen years[25] it has become increasingly aware of, and shown a willingness to deal with, the consequences to fair trial[26] of such untrammelled use of freedom of expression, both in federal[27] and state[28] criminal prosecutions.

A critical issue in each of these cases has been the kind and quantity of evidence in the record sufficient to show

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[24] *Bridges v. California*, 314 U. S. 252 (1941), established that press freedom was entitled to "the broadest scope that could be countenanced in an orderly society," subject only to the requirement of the clear and present danger standard, defined as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." See also *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Wood v. Georgia*, 370 U. S. 375 (1962).

[25] But five years after the petitioner's trial and three years after the denial of certiorari on his direct appeal.

[26] The source of the constitutional command upon state courts to provide fair trials for those accused of crime is, of course, the Due Process Clause of the Fourteenth Amendment, either standing alone or coupled with the Sixth Amendment. Whether the Sixth Amendment as a whole applies to the states through the Fourteenth, cf. *Adamson v. California*, 332 U. S. 46, 71-72 (1947) (dissenting opinion); *Griffin v. California*, 380 U. S. 609 (1965), or the Fourteenth Amendment includes the "fundamental" portions of the Sixth, *Gideon v. Wainwright*, 372 U. S. 335, 342 (1963) or incorporates a concept of "ordered liberty" distinct from the specific guarantees of the Bill of Rights, see *Pointer v. Texas*, 380 U. S. 400, 408 (1965) (concurring opinion), state prosecutions must meet the constitutional guarantee of fair trial. *Cox v. Louisiana*, 379 U. S. 559, 562 (1965); *Jackson v. Denno*, 378 U. S. 368, 377 (1964).

[27] *Marshall v. United States*, 360 U. S. 310 (1959); *Janko v. United States*, 366 U. S. 716 (1961).

[28] *Irvin v. Dowd*, 366 U. S. 717 (1961); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Estes v. Texas*, 381 U. S. 532 (1965). Cf. *Shepherd v. Florida*, 341 U. S. 50 (1951) (concurring opinion); *Stroble v. California*, 343 U. S. 181 (1952).

prejudice to the defendant requiring reversal. That this issue should be of prime concern in this area is not a surprising matter, both because prejudice resulting from publicity "may be so subtle that it escapes the ordinary methods of proof," [29] and because of the normal reluctance of a juror to concede his bias before his peers.[30]

In its earliest consideration of cases in this area beginning with *Stroble v. California*, this Court apparently required a showing of actual prejudice to the defendant before reversing a conviction on the ground that inflammatory publicity had contaminated the trial.[31] In subsequent cases, however, "the Court departed from the approach it charted in *Stroble v. California*" [32] and reversals were accomplished without such a showing upon the ground that prejudice was inherent in the trial and pretrial publicity.[33]

This latter approach to the protection of due process of law has a long and honorable history in this Court.

In *Tumey v. Ohio*, 273 U. S. 510, 532 (1927), Chief Justice Taft said:

> "Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict * * * or which might lead him not to hold the balance nice, clear and true

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[29] *Estes v. Texas*, 381 U. S. 532, 578 (1965) (concurring opinion).

[30] E.g., *Irvin v. Dowd*, 366 U. S. 717, 728 (1961): "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

[31] *Stroble v. California*, 343 U. S. 181 (1952); *Irvin v. Dowd*, 366 U. S. 717 (1961).

[32] *Estes v. Texas*, 381 U. S. 532, 543 (1965).

[33] *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Estes v. Texas*, 381 U. S. 532 (1965). *Accord*: *Turner v. Louisiana*, 379 U. S. 466 (1965); *Gideon v. Wainwright*, 372 U. S. 335 (1963); *White v. Maryland*, 373 U. S. 59 (1963).

between the State and the accused, denies the latter due process of law." (Emphasis supplied.)[34]

In *In re Murchison*, 349 U. S. 133, 136 (1955), Mr. Justice Black, speaking for the Court, said:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* * * * [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U. S. 11, 14." (Emphasis supplied.)[35]

The application of the principle that actual prejudice need not be shown where the circumstances are inherently suspect constitutionally is particularly appropriate in cases involving publicity-poisoned trials. For where such trial contamination is charged, "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." [36]

In cases involving both published confessions [37] and damaging accusatory publicity,[38] this Court has reversed convictions because of the inherently unconstitutional circumstances and not upon a showing of actual prejudice.

The instant case turned upon these considerations in the court below. Although there has never been any material disagreement about the extent or nature of the damaging publicity which inundated the community in which petitioner stood trial for murder, either in the opinions affirming his conviction on direct appeal or those in the

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[34] Quoted with approval in *Estes v. Texas*, 381 U. S. 532, 543 (1965).

[35] *Ibid.*

[36] *Id.* at 544.

[37] *Rideau v. Louisiana*, 373 U. S. 723 (1963).

[38] *Estes v. Texas*, 381 U. S. 532 (1965).

collateral proceeding presently before this Court, the majority of the Court of Appeals reversed the finding of the District Court that the newspaper publicity was inherently prejudicial. They held instead that the burden upon the petitioner of demonstrating the constitutional invalidity of his conviction was "one which must be carried 'not as a matter of speculation but as a demonstrable reality'," upon the authority of *inter alia, Stroble v. California,* 343 U. S. 181 (1952),[39] and that petitioner had not met that burden.

In seeking the grant of the writ of certiorari to review, and reverse the decision of the Court of Appeals, *amici* do not claim that all criminal trials conducted in the context of massive publicity are, without proof of actual prejudice, violative of the constitutional command that each accused is entitled to a fair trial by an impartial judge and jury.

Rather, *amici* urge this Court to continue in the direction it has begun in *Rideau* and *Estes* and grant certiorari in order to rule that certain specific types and varieties of pretrial and trial publicity,[40] all present in quantity and intensity in the case at bar, are inherently prejudicial to the accused, because they necessarily deny him a fair trial by both judge and jury.[41]

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[39] S. 8. This ruling was made despite the implications of *Rideau v. Louisiana,* 373 U. S. 723 (1963) and persisted upon application for rehearing after *Estes v. Texas* had made it clear that this Court had departed from the *Stroble* approach. 381 U. S. 532 (1965). S. 111-113.

[40] Because the jury was not sequestered in the instant case, but had the opportunity to view and hear the publicity disseminated during trial, both pretrial and trial publicity will be considered together.

[41] Throughout this brief it is presumed that the evil in inflammatory and oppressive news reporting and comment about a highly-publicized crime and trial affects the impartiality of the *judge* as well as the *jury.* For "[T]o deny that bludgeoning or poisonous comment has power to influence or at least to disturb,

(Continued on following page)

These varieties of publicity include:

I. Damaging publicity procured or cooperated in by state law enforcement authorities.

II. Damaging publicity relating to prospective testimony of prosecution witnesses not actually offered at the trial by the prosecution.

III. Damaging publicity describing evidence which, if offered by the prosecution at trial, would have been inadmissible and constitutionally prejudicial.

IV. Publicity which makes well-known personalities of the trial jurors.

V. Damaging publicity of an accusatory nature, whether or not participated in by law enforcement authorities, which charges guilt or attacks the character or reputation of the accused.

Each of these matters will be considered in sequence below.[42]

(Continued from preceding page)

the task of judging is to play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure." *Pennekamp v. Florida,* 328 U. S. 331, 359 (1946) (concurring opinion). In the instant case, the fact that the trial judge stood for re-election in the middle of the trial, with the political support of the local newspaper which had crusaded vigorously to have petitioner arrested and convicted of murder, needs no further embellishment. See S. 101.

[42] There is no question here about the requisite "state action" to permit this Court to find a federal constitutional violation in each of the varieties of pretrial and trial publicity described above. In (I) the prosecution's active creation of the publicity demonstrates the necessary state action. *Mooney v. Holohan,* 294 U. S. 103 (1935). In (II), (III), (IV), and (V), it must be underscored that the constitutional impediment to a trial conducted in the milieu of such publicity lies not in the fact that the *independent press published the material in question,* but rather *because the trial court failed to protect the impartiality of the tribunal* by granting the continuances, change of venue or mistrial repeatedly sought by defense counsel.

The argument that such matters are within the sound dis-

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I.

DAMAGING PUBLICITY INDUCED BY LAW ENFORCEMENT AUTHORITIES.

There can be no question but that the police, the county prosecutor and other law enforcement officials were the cooperative sources, if not the procuring cause of much of the inflammatory publicity in the news media of which petitioner complains. Quotations from policemen concerning their opinions as to petitioner's guilt and lack of character,[43] publication of "mug shots" of petitioner which could only have come from official jail records,[44] and predictions of a "bombshell witness" (with a detailed description of his prospective direct testimony) to be produced at the trial by the prosecution[45] (but who ultimately never testified in court) are illustrative examples.

It seems clear enough that

> "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice." [46]

That such conduct on the part of law enforcement authorities is prevalent in most highly-publicized trials,

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cretion of the trial court is hopelessly irrelevant because the judge was required to make his discretionary rulings at a time when he was as subject to the prejudicial atmosphere created by the press as was the jury. See discussion in footnote 41, *supra*.

[43] E.g., S. 110, S. 126.

[44] E.g., S. 125.

[45] E.g., S. 127.

[46] *Stroble v. California*, 343 U. S. 181, 201 (1952) (dissenting opinion).

either to obtain a climate of community opinion in which conviction is likely or to accommodate the press because of weakness or the hope of political favor, cannot seriously be doubted.[47]

The need, so far as criminal due process is concerned, is compelling and urgent. It remains for this Court to announce a rule of conduct for law enforcement authorities which will make costly their participation in trial by newspaper. Reversal of convictions where unconstitutional conduct by law enforcement authorities pervaded the proceedings has been used effectively by this Court as a deterrent to such conduct.[48] A presumption of inherent unconstitutionality in a highly publicized trial where law enforcement authorities actively participated in the inflammatory press releases would assist materially in eliminating the practice of "anticipatory trial by newspapers"[49] which currently blots our administration of criminal justice.

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[47] E.g., *Stroble v. California*, 343 U. S. 181 (1952) (prosecutor released confession to press even before defendant had completed his statement); *Shepherd v. Florida*, 341 U. S. 50 (1951) (newspapers published confession of defendant and attributed information to sheriff; confession never offered at trial); *Irvin v. Dowd*, 366 U. S. 717 (1961) (prosecutor and police officials issued intensively publicized press releases stating that petitioner had confessed to six murders); *Rideau v. Louisiana*, 373 U. S. 723 (1963) (accused interviewed in jail by sheriff for television). And see official account of opinion-molding and toadying to news media pressure by Dallas law enforcement authorities in the *Report of The President's Commission on the Assassination of President John F. Kennedy (1964)*, pp. 231-242.

[48] E.g., *Mapp v. Ohio*, 367 U. S. 643 (1961) (evidence obtained by illegal search and seizure); *Beck v. Ohio*, 379 U. S. 89 (1964) (unlawful arrest); *Griffin v. California*, 380 U. S. 609 (1965) (comment by prosecutor on failure of defendant to testify); and see *Mooney v. Holohan*, 294 U. S. 103 (1935); *Alcorta v. Texas*, 355 U. S. 28 (1957); *Napue v. Illinois*, 360 U. S. 264 (1959); *Brady v. Maryland*, 373 U. S. 83 (1963).

[49] *Irvin v. Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

II.

DAMAGING PUBLICITY DESCRIBING PROSECUTION EVIDENCE WHICH VARIES MATERIALLY FROM THAT INTRODUCED AT TRIAL BY THE PROSECUTION.

The record in the instant case is replete with prosecution evidence offered to the community by the news media but which never was offered in the actual trial. Charges by a police captain in command of the Cleveland police homicide bureau that petitioner was a "bare faced liar" in his sworn testimony[50] (although he never appeared as a rebuttal witness for the state at the trial), and newspaper revelation of the direct testimony of a prospective prosetion "bombshell witness" (who never testified in court)[51] are but two colorful examples.

This case bears witness to the wry comment of Mr. Justice Frankfurter, concurring in *Pennekamp v. Florida*, 328 U. S. 331, 362 (1946):

> "Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences."

Quite apart from the question of the active participation of the police and prosecutor in the dissemination of such matter to the community at large,[52] the danger to due process of law caused by such publication is evident.

As Mr. Justice Jackson, concurring in *Shepherd v. Florida*, 341 U. S. 50, 52 (1951), has pointed out:

> "When such events take place in the courtroom, defendant's counsel can meet them with evidence, argu-

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[50] S. 110.

[51] S. 109.

[52] Discussed *supra*, pp. 18-19.

ments, and requests for instructions and can at least preserve his objections on the record.

"But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable [evidence is] put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. * * *" (Bracketed material supplied.)

The prejudice to the defendant from such unoffered testimony in the news media is infinitely greater than if the same evidence were offered in court with appropriate due process safeguards. "[T]he propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." [53]

Under such circumstances, a presumption of prejudice to the accused is as clearly justifiable as though the evidence were offered in court without affording the defendant the opportunity to object to its introduction, make a record for appeal, confront witnesses, cross-examine, or subpoena additional witnesses to rebut such evidence.

The violence to due process is patent.

III.

DAMAGING PUBLICITY DESCRIBING PROSECUTION EVIDENCE WHICH WOULD BE INADMISSIBLE IN COURT.

Closely allied to the prejudicial effect of prosecution witnesses whose direct testimony was communicated by the news media to the public, but who never appeared in court to subject themselves to cross-examination, is the dissemination of evidence which clearly cannot be offered

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[53] *Patterson v. Colorado*, 205 U. S. 454, 463 (1907).

in court because, by its very nature, it is prejudicially inadmissible.

Such material abounds in the case at bar. For example, the publication of petitioner's pretrial refusal to subject himself either to "lie detector" or "truth serum" tests by the police, coupled with the snide editorial suggestion that such suspicious conduct was indicative of his guilt[54] undoubtedly did incalculable damage to petitioner's credibility, which, it must be noted, was the principal question presented to the jury.

Whether or not the evidence would have been inadmissible in court because of the well-known unreliability of "lie detectors" and "truth serum," [55] or for the constitutional reasons that comment upon such refusal would invade (a) his Fifth Amendment privilege to refuse to testify against himself[56] or (b) his Sixth Amendment right to have his guilt or innocence determined by an impartial tribunal rather than by such "scientific" substitutes,[57] it is clear that the entire question was mooted by the pretrial publication of such prejudicial matters, before defense counsel had an opportunity to object to its introduction in court. The tactical dilemma in which petitioner's trial counsel found himself as a result of such prejudicial pretrial publicity is well illustrated by his compelled failure to object to the introduction of such damaging evidence in court—evidence which was well known to the entire community already and which he would only have re-empha-

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[54] S. 119, 120.

[55] *Ohio v. Smith*, 113 Ohio App. 461, 462-3 (Lucas 1960); *Parker v. Friendt*, 99 Ohio App. 329, 335-338 (Cuyahoga 1954); *Freeman v. New York Central R. R. Co.*, 15 Ohio Op. 2d 187, 190 (App. Lucas 1960) and see Annotation, 23 ALR 2d 1308 for collected cases.

[56] See *Griffin v. California*, 380 U. S. 609 (1965).

[57] *Ohio v. Smith*, 113 Ohio App. 461, 463 (Lucas 1960).

sized by objecting—and the subsequent determination by the Court of Appeals that the constitutional question had been waived by his conduct.[58]

It must be emphasized that the claim of constitutional infirmity made by *amici* here is not that the lie detector and truth serum testimony was admitted into evidence (a question which the Court of Appeals determined had been waived by the conduct of defense counsel), but rather, that the pretrial publication of such evidence was so inherently prejudicial that defense counsel's timely motions for continuance, change of venue, and later, mistrial, should have been granted by the trial court as a constitutional necessity.

IV.

PUBLICITY WHICH MAKES CELEBRITIES OF THE TRIAL JURORS.

There can be little doubt that the jurors who sat as the trier of fact in the instant case became well-known in the community in which the trial took place as a result of the spotlight of publicity focused upon them by their selection as talesmen. The court permitted them to be photographed by press photographers in the courtroom and the jury room, prominent display of the photographs, names and addresses of the jurors appeared frequently on the front pages of the press[59] and feature articles about them, their dress, their families and their deliberations appeared in the news media with sufficient frequency to remove the jurors from the obscurity they had known before their association with this case and add color to the community pageant which was petitioner's murder trial.[60]

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[58] S. 47.

[59] S. 103, 105.

[60] S. 106, 107, 108, 128.

Since the jury was not sequestered, it may be presumed that the jurors were aware of the treatment accorded them by the news media during the trial.

This Court has most recently had occasion to examine the psychological impact of intense publicity upon the jurors in *Estes v. Texas*.[61] While the issue presented there involved televising trial proceedings, many of the same considerations apply to the case at bar.

"Where pretrial publicity of all kinds has created intense public feeling which is aggravated by" intense publicity focused on the jury, "the nerve center of the fact-finding process," those jurors "cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused" a juror, "realizing that he must return to neighbors who saw" or read detailed accounts of "the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused * * *'."

"Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets."[62]

If our jury system is to continue to have meaning, jurors must retain the anonymity which permits them to function best as representatives of their community in performing the delicate task of fact-finding. When this fragile balance has been upset by the communications media, the Sixth and Fourteenth Amendment guarantee of a fair trial by an impartial jury becomes meaningless.

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[61] 381 U. S. 532 (1965).

[62] *Id.* at 545-46.

V.

ACCUSATORY PUBLICITY WHICH CHARGES GUILT OR ATTACKS THE CHARACTER OR REPUTATION OF THE ACCUSED.

One fact jumps from the pages of the voluminous record in the case at bar with astonishing clarity. Seldom has such a zealous journalistic campaign been waged, first to arrest, and then to convict, an accused. Some of the varieties of trial by newspaper have already been chronicled above. Using only the language of the majority of the court below which found *no* constitutional infirmity in the trial and pretrial proceedings, the journalistic product has been alternately described as "shameful journalism," "certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it," [63] "violent and colorful language," [64] "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media," [65] "shabby reporting" [66] and "flamboyant and sometimes shabby pre-trial exhibitions of the press." [67]

It may well be that newspapers may be expected to perform no more nobly than they did in the early days of our country.[68] But the technological improvements in the communications media in the past two hundred years

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[63] S. 5.

[64] S. 14.

[65] S. 23.

[66] S. 23.

[67] S. 32.

[68] See letters of Thomas Jefferson as set out in Padover, Democracy, 150-151, reported in *Bridges v. California*, 314 U. S. 252, 270, f.n. 16 (1941): "I deplore * * * the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. * * * These ordures are rapidly depraving the public taste."

make similar excesses exceedingly more dangerous to due process of law and the administration of criminal justice than did the limited technology of former times.

The fact which isolates the pretrial and trial publicity in the instant case from that in many other highly-publicized criminal trials, however, is the single-minded attempt by the news media to convict petitioner of the murder of his wife. By the use of slashing editorials,[69] biting cartoons,[70] maudlin feature stories[71] and slanted news articles,[72] both before and during the trial, petitioner was continually accused of the murder of his wife, lying to the police, inhibiting the criminal investigation, and using his social position and friends in high places to conceal his dirty work. During the trial, radio broadcaster Robert Considine stated on a network program that petitioner's denial of guilt reminded him of the denials of Alger Hiss when Hiss was convicted of perjury, and Walter Winchell, also on a network radio broadcast, proclaimed that a girl in New York then under arrest for armed robbery had revealed that petitioner was the father of her illegitimate child.

With due regard for the freedom of the press to depart from its proper function of reporting the news in a factual manner, and to engage, without governmental restraint, in the inflammatory and cheap journalism about whose literary quality all of the appellate judges who have reviewed this case agree, it must be observed that "freedom carries with it responsibility, even for the press; freedom

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[69] S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 123, S. 124.

[70] S. 122, S. 129.

[71] S. 126.

[72] S. 125, S. 127.

of the press is not a freedom from responsibility for its exercise." [73]

Despite our nation's cultural and historic dedication to the First Amendment principle of freedom of expression, by word and in print, the news media must be reminded of the awful power which is theirs; they must come to understand that "a trial is not a 'free trade in ideas' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market,'" [74] that "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." [75]

This Court should hold that accusatory publicity which charges the defendant with guilt and attacks his character is inherently prejudicial, a denial of due process of law, and will require reversal of any subsequent conviction. Such a ruling would impress the news media, voluntarily and without judicial compulsion, to recognize their responsibilities toward the courts which protect their freedoms; further, it would serve as a warning to those who have a stake in preserving convictions obtained in the trial courts, that cynical use of the freedom of the press as a weapon to obtain a conviction will not be tolerated.

CONCLUSION.

Amici have urged the constitutional invalidity of the conviction of the petitioner because the trial court failed to protect the accused from the inherently prejudicial publicity which saturated the community in which he stood

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[73] *Pennekamp v. Florida*, 328 U. S. 331, 356 (1946) (concurring opinion).

[74] *Bridges v. California*, 314 U. S. 252, 283 (1941) (concurring opinion).

[75] *Id.*, at 271.

trial. For this reason, *amici* urge this Court to grant the writ of certiorari sought by petitioner so that his conviction may be reviewed and, ultimately, reversed. In doing so, this Court will have an opportunity to classify and provide working solutions for some of the difficult and delicate problems of free press and fair trial which currently beset the administration of criminal justice.

Respectfully submitted,

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